(1)

Supreme Court, U.S.
FILED

No. ____ 99 1038 DEC 17 1999

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

EASTERN ASSOCIATED COAL CORPORATION,
Petitioner,

v.

UNITED MINE WORKERS OF AMERICA, DISTRICT 17;
LOCAL 1503, UNITED MINE WORKERS OF AMERICA,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

RONALD E. MEISBURG
HEENEN, ALTHEN & ROLES
1110 Vermont Ave., N.W.
Suite 400
Washington, D.C. 20005
(202) 887-0800

ANNA M. DAILEY
DONNA C. KELLY
HEENAN, ALTHEN & ROLES
1380 One Valley Square
P.O. Box 2549
Charleston, West Virginia 25329
(304) 342-8960

JOHN G. ROBERTS, JR.*
DAVID G. LEITCH
H. CHRISTOPHER BARTOLOMUCCI
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

* Counsel of Record

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

81pp

QUESTIONS PRESENTED

1. Whether, as the First, Third, Fifth, Eighth, and Eleventh Circuits have held, there is a well defined and dominant public policy that prohibits enforcement of arbitration awards requiring reinstatement to safety sensitive positions of employees who test positive for illegal drugs, or whether, as the Second, Sixth, Ninth, Tenth, and now Fourth Circuits have held, no such policy exists and courts must therefore uphold reinstatement to safety sensitive positions of those who test positive for illegal drugs.

2. Whether, as the Fourth, Ninth, and District of Columbia Circuits have held, an arbitration award should be vacated on public policy grounds only when the award itself violates positive law or requires unlawful conduct by the employer, or whether, as the First, Third, Fifth, Seventh, Eighth, and Eleventh Circuits have held, such an award need not violate positive law to violate public policy—a question on which the Court granted certiorari, but did not reach, in *United Paperworkers International Union* v. *Misco, Inc.*, 484 U.S. 29 (1987).

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Eastern Associated Coal Corporation was the plaintiff-appellant below. Respondents the United Mine Workers of America, District 17, and Local 1503 of the United Mine Workers of America, were defendants-appellees below.

Petitioner is wholly owned by Coal Properties Corporation, which is in turn wholly owned by Peabody Holding Company, Inc., which is in turn wholly owned by P&L Coal Holdings Corporation. No publicly held company owns 10 percent or more of petitioner's stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY AND REGULATORY PROVISIONS INVOLVED	2
INTRODUCTION	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	6
I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT IN THE COURTS OF APPEALS ON THE QUESTION WHETHER PUBLIC POLICY IS VIOLATED BY AN ARBITRAL AWARD ORDERING REINSTATEMENT, TO A SAFETY SENSITIVE POSITION, OF AN EMPLOYEE WHO HAS TESTED POSITIVE FOR ILLEGAL DRUG USE	8
A. The Circuits Are Divided On Reinstatement Of An Employee Who Tests Positive For Illegal Drug Use To A Safety Sensitive Position	8
B. There Is A Well Defined And Dominant Public Policy Against Reinstatement Of Employees Who Test Positive For Illegal Drug Use To Safety Sensitive Positions	17
C. The Issue Is Important And Recurring	20

TABLE OF CONTENTS—Continued

Page

II. THIS COURT SHOULD ALSO ANSWER THE QUESTION ON WHICH IT GRANTED CERTIORARI, BUT DID NOT RESOLVE, IN *MISCO* 22

A. *Misco* Failed To Resolve A Conflict In The Courts Of Appeals Over Whether An Arbitrator's Award Must Violate Positive Law To Violate Public Policy 22

B. The Conflict In The Circuits Over The Question Left Open In *Misco* Has Grown Worse.. 24

CONCLUSION 30

APPENDICES

Appendix A:

Opinion of the United States Court of Appeals for the Fourth Circuit (August 20, 1999) 1a

Appendix B:

Opinion of the United States District Court for the Southern District of West Virginia (September 30, 1998) 5a

Appendix C:

Order of the United States Court of Appeals for the Fourth Circuit denying petition for rehearing and rehearing en banc (September 20, 1999)..... 22a

Appendix D:

Arbitration Award (August 1, 1997) 23a

Appendix E:

Regulatory Provisions Involved 30a

TABLE OF AUTHORITIES

CASES: Page

AFSCME v. *Department of Cent. Management Servs.*, 671 N.E.2d 668 (Ill. 1996) 26
American Postal Workers Union v. *United States Postal Serv.*, 789 F.2d 1 (D.C. Cir. 1986), *cert. dismissed*, 485 U.S. 680 (1988) 22, 24
Belves Co. v. *Teamsters Local 986*, 791 F.2d 1391 (9th Cir. 1986), *cert. denied*, 485 U.S. 985 (1987) 22, 23
Braxton v. *United States*, 500 U.S. 344 (1991) 17
Chrysler Motors Corp. v. *International Union*, 959 F.2d 685 (7th Cir.), *cert. denied*, 506 U.S. 908 (1992) 16
Cleveland Bd. of Educ. v. *International Bhd. of Firemen & Oilers Local 701*, 696 N.E.2d 658 (Ohio Ct. App. 1997) 15, 27
Communications Workers of Am. v. *Southeastern Elec. Coop.*, 882 F.2d 467 (10th Cir. 1989) 16
Delta Air Lines, Inc. v. *Air Line Pilots Ass'n Int'l*, 861 F.2d 665 (11th Cir. 1988), *cert. denied*, 493 U.S. 871 (1989) 8, 13, 14, 26
Doe v. *Central Ark. Transit*, 900 S.W.2d 582 (Ark. Ct. App. 1995) 15
E.I. DuPont de Nemours & Co. v. *Grasselli Employees Indep. Ass'n of East Chicago, Inc.*, 790 F.2d 611 (7th Cir.), *cert. denied*, 479 U.S. 853 (1986) 22, 23, 24
Exxon Corp. v. *Baton Rouge Oil & Chem. Workers Union*, 77 F.3d 850 (5th Cir. 1996) 8, 9, 11, 12
Exxon Corp. v. *Esso Workers Union, Inc.*, 118 F.3d 841 (1st Cir. 1997) 9, 10, 14, 19
Exxon Corp. v. *Esso Workers Union, Inc.*, 942 F. Supp. 703 (D. Mass. 1996) 14
Exxon Shipping Co. v. *Exxon Seamen's Union*, 73 F.3d 1287 (3d Cir.), *cert. denied*, 517 U.S. 1251 (1996) 11, 12, 18, 25
Exxon Shipping Co. v. *Exxon Seamen's Union*, 11 F.3d 1189 (3d Cir. 1993) 12, 25
Exxon Shipping Co. v. *Exxon Seamen's Union*, 993 F.2d 357 (3d Cir. 1993) 12, 24, 25

TABLE OF AUTHORITIES—Continued

Page

Gulf Coast Indus. Workers Union v. *Exxon Corp.*, 991 F.2d 244 (5th Cir.), *cert. denied*, 510 U.S. 965 (1993) ..... *passim*

Hobson v. *American Cast Iron Pipe Co.*, 690 So. 2d 341 (Ala. 1997) 15

IBEW, Local 97 v. *Niagara Mohawk Power Corp.*, 143 F.3d 704 (2d Cir. 1998) 10, 29

In re Amalgamated Transit Union, Local 717, No. 98-038, 1999 WL 1054715 (N.H. Nov. 23, 1999) 14, 15

Iowa Elec. Light & Power Co. v. *Local Union 204, IBEW*, 834 F.2d 1424 (8th Cir. 1987) 16, 24

Kennecott Utah Copper Corp. v. *Becker*, —— F.3d ——, 1999 WL 989338 (10th Cir. Oct. 29, 1999) 10, 13, 14

Lingle v. *Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988) 21

Local 97, IBEW v. *Niagara Mohawk Power Corp.*, —— F.3d ——, 1999 WL 975711 (2d Cir. Oct. 28, 1999), *petition for cert. filed*, 68 U.S.L.W. 3355 (U.S. Nov. 16, 1999) (No. 99-845) 15, 28

Martin v. *Shaw's Supermarkets, Inc.*, 105 F.3d 40 (1st Cir.), *cert. denied*, 522 U.S. 818 (1997) 21

Muschany v. *United States*, 324 U.S. 49 (1945) 7, 17

Newsday, Inc. v. *Long Island Typographical Union*, 915 F.2d 840 (2d Cir. 1990), *cert. denied*, 499 U.S. 922 (1991) 16

NLRB v. *Dixie Motor Coach Corp.*, 128 F.2d 201 (5th Cir. 1942) 19

Northwest Airlines, Inc. v. *Air Line Pilots Ass'n, Int'l*, 808 F.2d 76 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1014 (1988) 13, 22, 23

Skinner v. *Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) 19

Stead Motors of Walnut Creek v. *Automotive Machinists Lodge No. 1173*, 886 F.2d 1200 (9th Cir. 1989) (en banc), *cert. denied*, 495 U.S. 946 (1990) 27, 28

TABLE OF AUTHORITIES—Continued

	Page
Stroehmann Bakeries, Inc. v. *Local 776, Int'l Bhd. of Teamsters*, 969 F.2d 1436 (3d Cir.), *cert. denied*, 506 U.S. 1022 (1992)	16, 25, 28
Tennessee Valley Auth. v. *Tennessee Valley Trades & Labor Council*, 184 F.3d 510 (6th Cir. 1999)	10
Union Pacific R.R. v. *United Transp. Union*, 3 F.3d 255 (8th Cir. 1993), *cert. denied*, 510 U.S. 1072 (1994)	8, 13, 14
United Food & Commercial Workers Int'l Union, Local 588 v. *Foster Poultry Farms*, 74 F.3d 169 (9th Cir. 1996)	9, 10, 27, 28
United Paperworkers Int'l Union v. *Misco, Inc.*, 484 U.S. 29 (1987)	*passim*
United States Postal Serv. v. *American Postal Workers Union*, 736 F.2d 822 (1st Cir. 1984)	22, 23, 24, 26
United Transp. Union v. *Union Pacific R.R.*, 116 F.3d 430 (9th Cir. 1997)	9, 14
W.R. Grace & Co. v. *Local 759, Int'l Union of Rubber Workers*, 461 U.S. 757 (1983)	7, 17, 26
Westvaco Corp. v. *United Paperworkers Int'l Union*, 171 F.3d 971 (4th Cir. 1999)	16, 28

STATUTORY PROVISIONS:

28 U.S.C. § 1254(1)	2
28 U.S.C. § 1291	2
29 U.S.C. § 185	2
42 U.S.C. § 2473c	18
42 U.S.C. § 2473c(b)(3)	18
42 U.S.C. § 2473c(b)(5)	18
46 U.S.C. § 7702(c)(2)	18
49 U.S.C. § 5331	18
49 U.S.C. § 20140	18
49 U.S.C. § 31306	18

RULES AND REGULATIONS:

S. Ct. Rule 10(a)	17, 20
14 C.F.R. part 121, Appendix I	19
46 C.F.R. § 16.101(a)	19
49 C.F.R. § 219.1(a)	19

TABLE OF AUTHORITIES—Continued

	Page
49 C.F.R. § 382.101	19
49 C.F.R. § 382.301	4
49 C.F.R. § 382.301(a)	2
49 C.F.R. § 382.305	2
49 C.F.R. § 653.3	19

OTHER AUTHORITIES:

Scott Barbakoff, *Application of the Public Policy Exception for the Enforcement of Arbitral Awards: There is no Place Like "the Home" in* Saint Mary Home, Inc. v. Service Employees International Union, District 1199, 43 Vill. L. Rev. 829 (1998) 15

Stephen Buehrer, *A Clash of the Titans: Judicial Deference to Arbitration and the Public Policy Exception in the Context of Sexual Harassment*, 6 Am. U. J. Gender & L. 265 (1998) 16

Bob Fernandez, *Doubts Rise About U.S. Workplace-Safety Data*, Knight Ridder Tribune Business News (May 14, 1999) 20

Robert A. Gorman, *Labor Law: Unionization and Collective Bargaining* (1982) 24, 26

Jeffrey S. Klein & Nicholas J. Pappas, *Implementing and Enforcing Drug Treatment Programs—Part I*, 220 N.Y. L.J. 3 (Aug. 3, 1998) 21

Murray S. Levin, *The Role of Substantive Law in Business Arbitration and the Importance of Volition*, 35 Am. Bus. L.J. 105 (1997) 15

Bret F. Randall, *The History, Application, and Policy of the Judicially Created Standards of Review for Arbitration Awards*, 1992 BYU L. Rev. 759 ..... 29, 30

Jeffrey Sarles, *The Case of the Missing Woman: Sexual Harassment and Judicial Review of Arbitration Awards*, 17 Harv. Women's L.J. 17 (1994) 30

TABLE OF AUTHORITIES—Continued

Page

S.L. Smith & Virginia Sutcliffe, *The Real Deal: Drugs in the Workplace*, Occupational Hazards, Vol. 60, No. 9 (Sept. 1, 1998) 20

Arlus J. Stephens, *The Sixth Circuit's Approach to the Public-Policy Exception to the Enforcement of Labor Arbitration Awards: A Tale of Two Trilogies?*, 11 Ohio St. J. on Disp. Resol. 441 (1996) 15

U.S. Department of Labor, *Facts and Figures about Drugs and Alcohol in the Workplace*, Working Partners for an Alcohol- and Drug-Free Workplace (visited Dec. 15, 1999) <http://www.dol.gov/asp/public/programs/drugs/facts.htm> 20, 21

IN THE

Supreme Court of the United States

No. ———

EASTERN ASSOCIATED COAL CORPORATION,
Petitioner,

v.

UNITED MINE WORKERS OF AMERICA, DISTRICT 17;
LOCAL 1503, UNITED MINE WORKERS OF AMERICA,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Eastern Associated Coal Corporation respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the Fourth Circuit is unreported and reproduced in the appendix hereto ("App.") at 1a. The opinion of the District Court for the Southern District of West Virginia is reported at 66 F. Supp. 2d 796 and reproduced at App. 5a.

JURISDICTION

The judgment of the Fourth Circuit was entered on August 20, 1999. App. 1a. The Fourth Circuit denied a timely petition for rehearing and rehearing en banc on September 20, 1999. App. 22a. The jurisdiction of the

Fourth Circuit was based on 28 U.S.C. § 1291. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, provides in pertinent part: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter * * * may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." Pertinent provisions of Title 49 of the Code of Federal Regulations are reproduced at App. 30a.

INTRODUCTION

Eastern Associated Coal Corporation ("EACC") is a coal mining company. Its business requires the operation of heavy equipment—including trucks having gross vehicle weights of as much as 55,000 pounds—on public roads and highways. App. 6a. Operators of such equipment hold a position within EACC known as a Mobile Equipment Operator ("MEO"), and are required to have a commercial driver's license ("CDL"). Under regulations issued by the United States Department of Transportation ("DOT"), any person required to have a CDL must submit to drug and alcohol testing under specified circumstances. As the regulations apply to this case, they require such testing "[p]rior to the first time a driver performs safety sensitive functions for an employer," 49 C.F.R. § 382.301(a), and randomly thereafter, at a rate of at least 25 percent of an employer's drivers per year, unless adjusted by the Federal Highway Administration. *Id.* § 382.305.

This case concerns the ability of EACC and other employers to take strong disciplinary action against employees in safety sensitive positions who test positive for alcohol or drug use. EACC twice discharged the same MEO who tested positive for drug use, and on each occasion was required to reinstate that employee after a grievance procedure was concluded. The Fourth Circuit—adopting the position of the Second, Sixth, Ninth, and Tenth Circuits, in conflict with decisions of the First, Third, Fifth, Eighth, and Eleventh Circuits—held that such reinstatement was not contrary to public policy and affirmed the arbitrator's decision. The Fourth Circuit also endorsed the district court's determination that an award is contrary to public policy only when it would require illegal conduct on the part of the employer—an issue which has also divided the circuits and on which this Court granted certiorari, but did not reach, in *United Paperworkers International Union* v. *Misco, Inc.*, 484 U.S. 29 (1987).

This Court should grant certiorari on the related questions presented here to resolve the conflict in the circuits and to make clear that public policy prohibits forced reinstatement of drug abusers to safety sensitive positions —where they might endanger the lives of others—even if such reinstatement is not illegal *per se*.

STATEMENT OF THE CASE

Background. Together with the respondents—the United Mine Workers of America, District 17, and Local 1503 of the United Mine Workers (collectively, "the Union") —EACC is bound by the National Bituminous Coal Wage Agreement of 1993 ("Agreement"). App. 5a. Under the Agreement, "[t]he management of the mine, the direction of the working force and the right to hire and discharge are vested in" EACC. Ct. App. J.A. 34. EACC is permitted to discharge an employee for just cause, and

if the employee elects to follow the specified grievance procedure, the arbitrator must uphold the dismissal if he finds that just cause existed. *Id.* at 39-40.

Pursuant to the requirements of federal law, EACC has adopted a Drug and Alcohol Policy, which provides that "[i]f a driver submits a urine specimen for the purpose of a drug test, and the test shows positive levels * * * the driver will be removed from any safety sensitive position and subject to disciplinary action up to and including termination." App. 9a n.4. The company has thus made clear its position that a positive drug test constitutes "just cause" for termination.

James Smith's Positive Drug Tests. In early 1996, EACC drilling operator James Smith bid on and was selected to fill a vacant MEO position. Because his position required a CDL, Smith was required to submit to a drug test. *See* 49 C.F.R. § 382.301. In a test conducted in March 1996, Smith tested positive for the presence of cannabinoids—the chemical constituents of marijuana. Pursuant to the procedure outlined in the Agreement, EACC suspended Smith with the intent to discharge him, and then discharged him.

Neither Smith nor the Union ever challenged the accuracy of the 1996 drug test. App. 7a n.2. Nevertheless, Smith filed a grievance challenging his discharge, and an arbitrator entered an award in his favor. Under the award, Smith returned to work after a 30-day suspension without back pay and was required to participate in a substance abuse program. The arbitrator also required Smith to submit to random drug testing for five years. App. 7a.

In June 1997, while Smith was working as an MEO, his fourth random drug test yielded another positive result for cannabinoids, and EACC again suspended and then discharged him. App. 7a-8a. Smith again sought arbitration without challenging the accuracy of the test

results, and an arbitrator again ordered Smith reinstated. It is this second arbitration award, described more fully below, that is directly at issue in this case.

The Arbitration Award. The arbitrator found that "[t]he record is clear that the company has made a good faith effort through it's [sic] employee assistance program to rehabilitate the grievant." App. 27a. The arbitrator further recognized that "[i]t is understandable why the company wants to put an end to the matter by discharging grievant. The liability the company faces when an employee assigned to operate company equipment on public roads is found with drugs in his urine is very real." *Id.* The arbitrator found that Smith had received "full credit for his good record in the earlier arbitration" and for the fact that he was a "recreational user of illegal drugs and not an addicted user." *Id.* Criticizing Smith's argument that he might have avoided a first positive test had he been aware that he was going to be tested, the arbitrator noted that "[o]ne does not avoid illegal drugs because one might be tested," but rather because "drugs have a negative impact on job performance, safety and company liability." App. 28a.

Despite all this, the arbitrator once again "rescued" Smith from the "understandable" consequences of his actions. App. 27a. He found "creditable" Smith's testimony that a "personal/family problem" caused a "one time lapse in drug usage." App. 28a. While making that finding, however, the arbitrator recognized the possibility that he may have been "misled by the grievant," and the arbitrator apparently found comfort in the fact that he was "confident," if that were the case, "that the grievant will make another misstep with drug use and be caught." *Id.* Giving Smith the chance to make such a "misstep" while operating heavy equipment on the public highways, the arbitrator ordered Smith reinstated and required him to provide EACC with a resignation letter which the com-

pany could accept if Smith tested positive for drugs a third time. App. 29a.

Decisions Below. Seeking to overturn the arbitration award, EACC filed a complaint in district court which alleged, among other things, that "[c]lear, positive law, including the [DOT] Regulations, evidence a well defined and dominant public policy against the performance of safety sensitive tasks while under the influence of drugs," Ct. App. J.A. 13, and that the award "clearly violates this public policy" and therefore must be vacated. *Id.* at 14.

The district court upheld the arbitrator's decision. The court recognized that the question whether the award should be set aside on public policy grounds is "one for resolution by the courts." App. 17a (quoting *Misco*, 484 U.S. at 43 (citations and internal quotation marks omitted)). The court reviewed a variety of sources—including the DOT regulations and decisions from the First, Fifth, Eighth, and Eleventh Circuits—and determined that "a well defined and dominant policy exists against the use of controlled substances by those who perform safety sensitive jobs." App. 20a. The court determined, however, that Smith's *reinstatement* was not contrary to public policy because the DOT regulations "do not make it illegal to reinstate employees who test positive for drug use." App. 21a. Thus, in the court's view, the public policy exception to enforcement of arbitration awards is activated only when the award is illegal *per se*.

On appeal, the Fourth Circuit found that "the district court correctly decided the issues before it," and affirmed "on the reasoning of the district court." App. 4a.

REASONS FOR GRANTING THE WRIT

More than a dozen years ago, this Court in *Misco* articulated the rules applicable to review of arbitration awards on public policy grounds in considering an award

that ordered reinstatement of an employee suspected of bringing marijuana onto the work site. The Court affirmed its earlier holding in *W.R. Grace & Co.* v. *Local 759, International Union of Rubber Workers,* 461 U.S. 757, 766 (1983), that "the question of public policy is ultimately one for resolution by the courts," and that an arbitral award should not be enforced where its enforcement would violate a "well defined and dominant" public policy. *Id.* (citing *Muschany* v. *United States,* 324 U.S. 49, 66 (1945)).

Since the Court's decision in *Misco,* the lower courts have been called upon to apply the rules articulated in that case to a variety of different situations. One common fact pattern has repeatedly been at issue, as it was below: an employee in a safety sensitive position—truck driver, airline pilot, oil tanker seaman, and the like—tests positive for illegal drug use, is discharged by the employer, and ordered reinstated by an arbitrator. Courts reviewing such awards, and attempting to apply this Court's guidance in *Misco,* have reached dramatically different results. Employees in the Second, Fourth, Sixth, Ninth, and Tenth Circuits are reinstated in such circumstances, while those in the First, Third, Fifth, Eighth, and Eleventh Circuits are not. The Court should grant certiorari to review the deep conflict on this recurring and important question.

Also implicated by the decisions below is an issue on which this Court granted certiorari in *Misco* but found not necessary to reach—whether a court may refuse to enforce an arbitration award on public policy grounds only when the award itself violates positive law or requires unlawful conduct by the employer. *See* 484 U.S. at 45 n.12; *id.* at 46 (Blackmun, J., concurring). The Court thus recognized in 1987 that its review of this issue was necessary, and in the intervening twelve years the conflict on this question has deepened. The question

on which the Court granted certiorari in *Misco* remains one on which this Court's guidance is required.

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT IN THE COURTS OF APPEALS ON THE QUESTION WHETHER PUBLIC POLICY IS VIOLATED BY AN ARBITRAL AWARD ORDERING REINSTATEMENT, TO A SAFETY SENSITIVE POSITION, OF AN EMPLOYEE WHO HAS TESTED POSITIVE FOR ILLEGAL DRUG USE

A. The Circuits Are Divided On Reinstatement Of An Employee Who Tests Positive For Illegal Drug Use To A Safety Sensitive Position

In holding that Smith's reinstatement here did not violate a "well defined and dominant" public policy, the Fourth Circuit simply adopted wholesale the reasoning of the district court as its own. App. 4a. For its part, the district court identified "a plentitude of positive law to support the existence of a well defined and dominant public policy against the performance of safety sensitive jobs by employees under the influence of drugs." App. 18a. In support of this conclusion, the district court relied on decisions of the Fifth, Eighth, and Eleventh Circuits. *See* App. 18a-19a (citing *Gulf Coast Indus. Workers Union* v. *Exxon Corp.*, 991 F.2d 244 (5th Cir.), *cert. denied*, 510 U.S. 965 (1993); *Exxon Corp.* v. *Baton Rouge Oil & Chem. Workers Union*, 77 F.3d 850 (5th Cir. 1996); *Union Pacific R.R.* v. *United Transp. Union*, 3 F.3d 255 (8th Cir. 1993), *cert. denied*, 510 U.S. 1072 (1994); *Delta Air Lines, Inc.* v. *Air Line Pilots Ass'n Int'l*, 861 F.2d 665 (11th Cir. 1988), *cert. denied*, 493 U.S. 871 (1989)).

The court below also recognized that other decisions "expand[] this public policy from situations where the employee is shown to be under the influence of drugs to situations where the employee merely tests positive for

drugs although there is no evidence that he was under the influence while on the job." App. 19a (citing *Exxon Corp.* v. *Esso Workers Union, Inc.*, 118 F.3d 841 (1st Cir. 1997); *Exxon Corp.* v. *Baton Rouge, supra*). The district court seemingly endorsed that expanded public policy when it found, "[b]ased upon the foregoing, * * * that a well defined and dominant public policy exists against the use of controlled substances by those who perform safety sensitive jobs." App. 20a.

The court below, however, stopped short of following that policy to its logical conclusion, because it found no well defined and dominant policy "enjoining the employment of commercial motor vehicle drivers who test positive for drug use." App. 20a. *See also* App. 3a-4a. In endorsing this conclusion, the Fourth Circuit deepened an existing conflict on the question presented.

Consistent with the decision below, other circuits have also found that public policy is not violated by reinstating an employee to a safety sensitive position where the employee has tested positive for drug use. In *United Transportation Union* v. *Union Pacific Railroad Co.*, 116 F.3d 430 (9th Cir. 1997), the Ninth Circuit reversed a decision vacating an arbitration award which ordered reinstatement of a railroad employee who failed a drug test. While the district court had found an " 'explicit, well-defined, and dominant public policy against drug use in the railroad industry,' " *id.* at 433, the Ninth Circuit stressed that the arbitration panel had made no determination that the employee "had in fact used drugs on the day in question," *id.* at 434, and instead rested on the fact that the employee "merely" tested positive for drugs. *Id.* It concluded that "the relevant public policy does not specifically and explicitly militate against reinstatement of employees who have merely tested positive for drugs." *Id.* *See also United Food & Commercial Workers Int'l Union,*

Local 588 v. *Foster Poultry Farms*, 74 F.3d 169 (9th Cir. 1996).

The Tenth Circuit recently reached the same conclusion in *Kennecott Utah Copper Corp.* v. *Becker*, —— F.3d ——, 1999 WL 989338 (10th Cir. Oct. 29, 1999). *Kennecott* involved a positive drug test, unaccompanied by a finding "that grievant ever used drugs at work or was impaired while operating in a safety sensitive position." *Id.* at *4. The court held that no public policy was violated by a reinstatement order in these circumstances and specifically declined Kennecott's urging that it follow the decision of the First Circuit in *Esso Workers' Union, supra*, which, as discussed below, vacated a reinstatement order in similar factual circumstances.

The Second and Sixth Circuits are in alignment with the Fourth, Ninth, and Tenth Circuits. In *IBEW, Local 97* v. *Niagara Mohawk Power Corp.*, 143 F.3d 704, 718 (2d Cir. 1998), the Second Circuit upheld reinstatement of a nuclear power plant technician who "adulterated a drug test, subsequently tested positive for drugs, and denied having a substance abuse problem when initially confronted with the test results." The Sixth Circuit reached a similar result in *Tennessee Valley Authority* v. *Tennessee Valley Trades and Labor Council*, 184 F.3d 510 (6th Cir. 1999), which involved a nuclear reactor operator who tested positive for marijuana use.

In these decisions, the Second, Fourth, Sixth, Ninth, and Tenth Circuits have made clear that they will not upset arbitration awards ordering reinstatement as contrary to public policy where an employee in a safety sensitive position has tested positive for drug use. As we explain below, each of these cases would have come out differently in the First, Third, Fifth, Eighth, and Eleventh Circuits.

The First Circuit's decision in *Exxon Corp.* v. *Esso Workers' Union, supra*, is a leading case among those

in conflict with the rule in the Second, Fourth, Sixth, Ninth, and Tenth Circuits. The employee in *Esso Workers' Union*, also named Smith, was "responsible for loading, driving, and unloading a five-axle tractor-trailer combination which, when fully loaded, carries 12,000 gallons of highly flammable motor fuel," and "typically dr[o]ve[] this rig through many of New England's more densely populated areas." 118 F.3d at 843. Smith was fired after testing positive for cocaine in a random drug test, but was ordered reinstated after arbitration.

The First Circuit declined to enforce the arbitration award. After outlining the principles of review established in *Misco*, *id.* at 846, the First Circuit discussed decisions of the Third, Fifth, Eighth, and Eleventh Circuits, as well as statutory and regulatory provisions, and found "a solid phalanx of positive law evidencing a well defined and dominant public policy against the performance of safety-sensitive tasks while under the influence of drugs." *Id.* at 849. The court then rejected the argument—which the Fourth Circuit accepted below—that "reinstating Smith would not insult such a policy because there is no evidence that Smith was in the grip of cocaine while driving his petroleum truck," and " 'merely' " evidence that cocaine was in his blood stream. *Id.* at 849. Declining to require an employer to "await the occurrence of an accident before discharging an employee who tests positive for drug use," *id.*, the First Circuit held that the well defined and dominant public policy it identified permitted employers to discharge such employees.

The First Circuit noted that "recent cases track the expanding public policy on which we rely," *id.* at 850, citing *Baton Rouge Oil*, *supra*, and *Exxon Shipping Co.* v. *Exxon Seamen's Union*, 73 F.3d 1287 (3d Cir.), *cert. denied*, 517 U.S. 1251 (1996). In *Baton Rouge Oil*, the Fifth Circuit held that the public policy exception to enforcement of arbitration awards "must be read not only to

prohibit the prospective placement of an employee [who tested positive for drug use] into a position where he is a danger to his company and to fellow employees (*i.e.*, order of reinstatement into a safety-sensitive position)" but also to prohibit an alternative award of back pay to such an employee. 77 F.3d at 856.

For the former conclusion, which is at odds with the Fourth Circuit's decision here, the Fifth Circuit relied on its earlier decision in *Gulf Coast Industrial Workers Union* v. *Exxon, supra.* There, the court considered an arbitrator's order of reinstatement of an employee who—like the employee here—had tested positive for drug use a second time, on the view—like that of the arbitrator here—that the employee "seemed 'a good bet for successful rehabilitation.'" 991 F.2d at 248. The court surveyed federal statutes, state statutes, various regulations, and judicial decisions, *id.* at 250-254, to conclude that it would offend public policy for the employee to retain his job after twice testing positive for drug use. *Id.* at 255.

The Third Circuit has also aligned itself with the First and Fifth Circuits in three decisions each styled *Exxon Shipping Co.* v. *Exxon Seamen's Union.* In the first, reported at 993 F.2d 357 (3d Cir. 1993) (*Exxon I*), the court affirmed an order vacating an arbitration award that reinstated an oil tanker helmsman who tested positive for cannabinoids after a shipping accident. In the second case, reported at 11 F.3d 1189 (3d Cir. 1993) (*Exxon II*), the court upheld a district court order vacating an arbitration award reinstating a seaman who was "highly intoxicated while on duty." *Id.* at 1190. And in a third case, reported at 73 F.3d 1287 (3d Cir. 1996) (*Exxon III*), the court found that public policy would also support vacatur of an award ordering reinstatement of an employee who refused to submit to a drug test where the employer had cause to require such a test.

The Eighth Circuit has likewise held that reinstatement orders in these circumstances are contrary to public policy. In *Union Pacific Railroad* v. *United Transportation Union, supra*, a divided panel of the Eighth Circuit upheld the vacatur of an arbitrator's reinstatement award where a railroad brakeman failed a post-accident drug test. The court had "no difficulty in concluding that there exists a well-defined and dominant public policy against a railroad's employment of individuals whose impaired judgment due to the use of drugs or alcohol could seriously threaten public safety." 3 F.3d at 261. The court found this policy violated by the arbitration award reinstating "to his former position a railroad employee who poses a significant risk to the public because of his potential for future drug use on the job." *Id.* at 262.

Finally, the Eleventh Circuit rejected a reinstatement order where a commercial airline pilot was drunk while flying a passenger plane. *Delta Air Lines* v. *Air Line Pilot's Ass'n, supra.* The court held that the airline had just cause to terminate the pilot and that the reinstatement award in these circumstances violated public policy. 861 F.2d at 674.[1]

In *Kennecott*, the Tenth Circuit attempted to distinguish the decisions finding reinstatement to be contrary to public policy on the ground that those cases involved employees who "used drugs at work or [were] impaired while operating in a safety sensitive position," while cases reaching a different result involved employees who (in the

---

[1] Prior to this Court's decision in *Misco*, the D.C. Circuit upheld a reinstatement order in factual circumstances very similar to those in which the Eleventh Circuit declined to do so. *See Northwest Airlines, Inc.* v. *Air Line Pilots Ass'n Int'l*, 808 F.2d 76 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1014 (1988). That circuit has not considered a similar case since that time, and—with the Seventh and Federal Circuits—are the only circuits not to be heard from since *Misco* on the question of reinstating employees who test positive for drug use.

words of the Ninth Circuit in *United Transportation Union*, 116 F.3d at 434) "merely" tested positive for illegal drugs without evidence of on-the-job use or impairment. *Kennecott*, 1999 WL 989338 at *4. While some of the decisions certainly do involve on-duty use or impairment, *see, e.g., Delta Air Lines, supra*, the cases do not rest on such a distinction. On the contrary, courts finding that reinstatement violates public policy have not required a finding that the employee who tests positive for drug use also be shown to have used drugs or been impaired while on the job, and have expressly noted the *absence* of such facts. *See, e.g., Esso Workers' Union*, 118 F.3d at 844 ("the test results could not indicate when Smith had used the cocaine or whether he had performed his job while still under its pernicious influence");[2] *Union Pacific*, 3 F.3d at 262 ("We emphasize that we have not decided whether Madison was in fact impaired by drugs at the time of the incident"); *Gulf Coast*, 991 F.2d at 254 ("The record does not show that Woods was impaired while on duty or that he used cocaine on Exxon's premises."). In each of these cases, a reinstatement award was vacated; in the Second, Fourth, Sixth, Ninth, and Tenth Circuits, the decision would have come out the other way.

These decisions—all issued after this Court's decision in *Misco*—make clear that the circuits are hopelessly conflicted on application of the public policy exception to enforcement of arbitration awards reinstating employees who fail drug tests—the use of which is widespread in industries whose operations present public safety risks.[3]

---

[2] The district court in *Esso Workers' Union* had in fact distinguished its decision to uphold reinstatement from others that vacated reinstatement on the ground that the latter involved on-duty conduct. *See* 942 F. Supp. 703, 709 n.1 (D. Mass. 1996). The First Circuit's reversal made plain that it did not—as the Tenth Circuit in *Kennecott* mistakenly assumed—require on-duty misconduct to find that reinstatement was against public policy.

[3] State appellate courts are likewise in conflict over the public policy question at issue here. *Compare, e.g., In re Amalgamated*

The confusion over the public policy exception, moreover, is not limited to that particular context, but extends to reinstatement decisions where other workplace rules reflecting public policy have been violated.[4] Thus, for example, the Second Circuit has declined to disturb reinstatement awards where employees violated safety regulations at nuclear power facilities, *see Local 97, IBEW* v. *Niagara Mohawk Power Corp.*, —— F.3d ——, 1999 WL 975711 (2d Cir. Oct. 28, 1999), *petition for cert. filed*, 68 U.S.L.W. 3355 (U.S. Nov. 16, 1999) (No. 99-845),

---

Transit Union, Local 717, No. 98-038, 1999 WL 1054715 (N.H. Nov. 23, 1999) (dominant public policy prohibits reinstatement to a safety sensitive position of those who test positive for drug use); *Hobson* v. *American Cast Iron Pipe Co.*, 690 So. 2d 341, 345 (Ala. 1997) ("We hold that Alabama public policy precludes awarding reinstatement and back pay to a 'safety sensitive' employee who is discharged for testing positive for a controlled substance in the workplace."); *Cleveland Bd. of Educ.* v. *International Bhd. of Firemen & Oilers Local 701*, 696 N.E.2d 658, 667 (Ohio Ct. App. 1997) ("[W]e find that enforcement of the arbitrator's award [of reinstatement] is contrary to an explicit, well-defined and dominant public policy of state and federal law to suppress illegal drug use among transportation employees."), *with Doe* v. *Central Ark. Transit*, 900 S.W.2d 582, 585 (Ark. Ct. App. 1995) ("We do not believe the arbitrator's decision [reinstating bus driver who tested positive for cocaine] violated public policy").

[4] *See* Scott Barbakoff, *Application of the Public Policy Exception for the Enforcement of Arbitral Awards: There is no Place Like "the Home" in* Saint Mary Home, Inc. v. Service Employees International Union, District 1199, 43 Vill. L. Rev. 829, 830-831, 841-848 (1998) (perceiving three-way split on public policy exception); Murray S. Levin, *The Role of Substantive Law in Business Arbitration and the Importance of Volition*, 35 Am. Bus. L.J. 105, 156 (1997) ("Both before and after *Misco*, the lower courts have struggled with the public policy ground for vacation."); Arlus J. Stephens, *The Sixth Circuit's Approach to the Public-Policy Exception to the Enforcement of Labor Arbitration Awards: A Tale of Two Trilogies?*, 11 Ohio St. J. on Disp. Resol. 441, 444 (1996) (After *Misco*, "there continues to be disagreement among the circuit courts as to how expansive—or narrow—the parameters are for judges to vacate awards on this [public policy] basis"); *id.* at 450-455 (describing conflicting decisions).

while the Eighth Circuit has reached the opposite conclusion. *Iowa Elec. Light & Power Co.* v. *Local Union 204, IBEW*, 834 F.2d 1424, 1427 (8th Cir. 1987).

The Fourth Circuit recognized the existence of a similar conflict earlier this year in *Westvaco Corp.* v. *United Paperworkers International Union, AFL-CIO*, 171 F.3d 971 (4th Cir. 1999), where it upheld an arbitrator's decision to reinstate an employee who had repeatedly sexually harassed a co-worker. The court "agree[d] with those circuits that have concluded the general public policy against sexual harassment is not sufficient to supplant labor arbitration of employee disciplinary sanctions," *id.* at 977,[5] and expressly declined to side with circuits reaching a contrary holding. *Id.*[6] While the *Westvaco* court was careful to point out that its decision did not involve "conduct that compromises the performance of a safety-sensitive job" or "criminal statutes prohibiting drug use, possession, and distribution in the workplace," which "may raise concerns not present here," *id.* at 977 n.2, the Fourth

---

[5] Citing *Chrysler Motors Corp.* v. *International Union*, 959 F.2d 685 (7th Cir.) (upholding arbitrator's reinstatement of employee dismissed for sexual harassment), *cert. denied*, 506 U.S. 908 (1992); *Communications Workers of Am.* v. *Southeastern Elec. Coop.*, 882 F.2d 467 (10th Cir. 1989) (same).

[6] Citing *Stroehmann Bakeries, Inc.* v. *Local 776, Int'l Bhd. of Teamsters*, 969 F.2d 1436, 1442 (3d Cir.) (holding over dissent that "an award which fully reinstates an employee accused of sexual harassment without a determination that the harassment did not occur violates public policy"), *cert. denied*, 506 U.S. 1022 (1992); *Newsday, Inc.* v. *Long Island Typographical Union*, 915 F.2d 840, 845 (2d Cir. 1990) (affirming decision vacating award of reinstatement on the ground that it "completely disregarded the public policy against sexual harassment in the workplace"), *cert. denied*, 499 U.S. 922 (1991). *See also* Stephen Buehrer, *A Clash of the Titans: Judicial Deference to Arbitration and the Public Policy Exception in the Context of Sexual Harassment*, 6 Am. U. J. Gender & L. 265, 281-282 (1998) (noting "the contradictory views which cloud this area of the law" and the "sharp[] contrast" between decisions of the Second and Third Circuits and those of the Seventh and Tenth Circuits).

Circuit glided over those concerns in this case, and extended its position to cover conduct that *does* compromise the performance of a safety sensitive job and involve criminal statutes prohibiting drug use in the workplace.

Thus, a decision by this Court in this case will provide not only resolution of the public policy question concerning reinstatement to safety sensitive positions of employees who test positive for drugs but also much needed guidance on how courts should address reinstatement orders where an employee has violated workplace rules and related public policies. The Court should grant certiorari to address the deep circuit conflict over these important and recurring issues. *See* S. Ct. Rule 10(a); *Braxton* v. *United States*, 500 U.S. 344, 347 (1991) (a "principal purpose for which we use our certiorari jurisdiction * * * is to resolve conflicts among the United States courts of appeals").

B. There Is A Well Defined And Dominant Public Policy Against Reinstatement Of Employees Who Test Positive For Illegal Drug Use To Safety Sensitive Positions

The Fourth Circuit's decision below not only implicated a well defined split on a recurring issue, but also reached the wrong resolution of that issue under the principles articulated in *W.R. Grace* and *Misco*. In *Misco*, this Court repeated its admonition that public policy sufficient to permit a court to decline to enforce an arbitration award "must be 'ascertained "by reference to the laws and legal precedents and not from general considerations of supposed public interests."'" 484 U.S. at 44 (quoting *W.R. Grace*, 461 U.S. at 766 (quoting *Muschany*, 324 U.S. at 66)). Here, examination of the "laws and legal precedents" makes clear that there *is* a well defined and dominant public policy against having employees who test positive for drugs operating in safety sensitive positions, and that arbitration awards ordering employers to re-

instate such employees to those jobs—where scores or hundreds of lives might be endangered—violate that public policy, as the First, Third, Fifth, Eighth, and Eleventh Circuits have held. *See, e.g., Esso Workers' Union*, 118 F.3d at 846-850 (discussing various bases for discerning this public policy); *Gulf Coast*, 991 F.2d at 250-255 (same).

Congress has repeatedly spoken to the issue, by enacting a series of industry-specific testing requirements for those who occupy safety sensitive positions. In support of such requirements, Congress has found that "the greatest efforts must be expended to eliminate the abuse of alcohol and the use of illegal drugs, whether on duty or off duty, by those individuals who are involved in the positions affecting safety, security, and national security." 42 U.S.C. § 2473c(b)(3). Because "the most effective deterrent to abuse of alcohol and the use of illegal drugs is increased testing, including random testing," *id.* § 2473c (b)(5), Congress has required drug testing programs for, among others, those in safety sensitive positions in the space program, *id.* § 2473c, employed as merchant seaman, 46 U.S.C. § 7702(c)(2), related to mass transportation, 49 U.S.C. § 5331, operating rail equipment, 49 U.S.C. § 20140, and responsible for operation of commercial motor vehicles. 49 U.S.C. § 31306.

The judgment of Congress is also reflected in a variety of regulations designed to implement the congressional command. As the Third Circuit observed in *Exxon III*, "[t]he federal government has manifested its strong support for drug testing of employees involved in mass transportation through the promulgation by all federal agencies governing mass transportation of regulations designed to prevent drug use by employees in safety sensitive positions." 73 F.3d at 1294. Such regulations include those issued by the Federal Aviation Administration, the Coast Guard, the Federal Railroad Administration, the Federal

Transit Administration, and—as directly applicable here—the Federal Highway Administration. *See Esso Workers' Union*, 118 F.3d at 848 (citing 14 C.F.R. part 121, Appendix I; 46 C.F.R. § 16.101(a); 49 C.F.R. §§ 219.1(a), 653.3, 382.101). As a whole, this regulatory structure confirms that the use of illegal drugs by those in safety sensitive positions is contrary to well defined and dominant public policy.

This Court too has recognized a "governmental interest in ensuring the safety of the travelling public and of the employees themselves," which "plainly justifies prohibiting covered employees from using alcohol or drugs on duty, or while subject to being called for duty." *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602, 621 (1989).[7]

Requiring employers to reinstate employees who test positive for drug use to jobs affecting worker and public safety plainly violates this dominant policy. As the First Circuit has observed, "[i]t makes no sense to construe public policy as encouraging—and in some cases mandating—employers to establish and enforce drug testing programs, yet to preclude them from taking decisive action against those employees who test positive." *Esso Workers' Union*, 118 F.3d at 850. On the contrary, "it would insult public policy for a court to enforce a contract that requires the ongoing employment in a safety-sensitive capacity of a worker who has scorned the employer's drug-free workplace program." *Id.* at 851.

---

[7] This dominant public policy is not a recent invention. *See NLRB* v. *Dixie Motor Coach Corp.*, 128 F.2d 201, 203 (5th Cir. 1942) ("the public interest * * * requires of any one entrusted with the lives and safety of the travelling public that he conduct himself in a manner in keeping with his responsibilities. * * * The undisputed facts show that this employee's drinking habits * * * place[d] upon his employer *the duty* to discharge him.") (emphasis added).

The insult is particularly notable here. Smith did not "merely" fail a drug test, but was a repeat offender. His dismissal occurred after he once tested positive for drug use, was put on notice that he would face random drug tests in the future, and then failed a subsequent drug test. While the arbitrator somehow took comfort in his supposition that Smith would be caught if he once again engaged in illegal drug use, App. 28a, it makes a mockery of the public policy described above to require the employer—and the public—to shoulder the risk that Smith's third strike might be discovered by sifting through the rubble of an accident involving Smith's 55,000 pound truck. Well defined and dominant public policy prohibits enforcement of an arbitration award requiring petitioner to entrust the operation of such a vehicle on the public highways to a repeat user of illegal drugs.

C. The Issue Is Important And Recurring

The need for resolution of the deep conflict in the courts of appeals is underscored by the undeniable importance and recurring nature of the issue dividing the courts. *See* S. Ct. Rule 10(a). Workplace safety is a national concern, with implications reaching far beyond the workplace itself. Over 5,000 people die from work-related injuries each year. *See, e.g.*, Bob Fernandez, *Doubts Rise About U.S. Workplace-Safety Data*, Knight Ridder Tribune Business News (May 14, 1999). A recent study by the U.S. Department of Labor estimates that 47 percent of all workplace accidents are drug-related. *See* S.L. Smith & Virginia Sutcliffe, *The Real Deal: Drugs in the Workplace*, Occupational Hazards, Vol. 60, No. 9, at 23 (Sept. 1, 1998). According to the National Institute of Drug Abuse, a drug-using employee is 3.6 times more likely to be involved in a workplace accident. *See* U.S. Department of Labor, *Facts and Figures about Drugs and Alcohol in the Workplace*, Working Partners for an Alcohol- and Drug-Free Workplace (visited Dec. 15, 1999)

<http: / www.dol.gov / asp / public / programs / drugs / facts.htm>.

Employing individuals who use drugs in safety sensitive positions not only puts the health and safety of others at risk, but also increases the costs of doing business. It is estimated that illegal drug use costs American businesses more than $60 billion annually—costs that include tragic workplace accidents. *See* Jeffrey S. Klein & Nicholas J. Pappas, *Implementing and Enforcing Drug Treatment Programs—Part I*, 220 N.Y. L.J. 3 (Aug. 3, 1998).

The Fourth Circuit's decision—and those of the other circuits with which it is aligned—raise grave concerns because they seriously compromise the ability of employers to ensure workplace safety. These concerns are particularly heightened where, as here, an employee in a safety sensitive position who has tested positive for drugs poses a threat to the public at large because, for example, he operates a motor vehicle on public roads or works in a nuclear power plant. The issue concerning the reinstatement of employees who test positive for drugs to safety sensitive positions is therefore one of great consequence, and merits this Court's review.

The issue is also one that will obviously continue to recur. Not only does the sheer number of cases cited in this Petition suggest as much, but the standard use of arbitration clauses in labor agreements in a wide variety of industries leaves no doubt that it will. *See, e.g., Lingle* v. *Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 411 n.11 (1988) (arbitrators are designated by nearly all collective bargaining agreements as the adjudicators of contract disputes); *Martin* v. *Shaw's Supermarkets, Inc.*, 105 F.3d 40, 42 (1st Cir.) (arbitration clauses are "almost always a feature of labor contracts"), *cert. denied*, 522 U.S. 818 (1997). This Court's resolution of the issue presented is therefore necessary to ensure consistent results in countless future cases.

II. THIS COURT SHOULD ALSO ANSWER THE QUESTION ON WHICH IT GRANTED CERTIORARI, BUT DID NOT RESOLVE, IN *MISCO*

A. *Misco* Failed To Resolve A Conflict In The Courts Of Appeals Over Whether An Arbitrator's Award Must Violate Positive Law To Violate Public Policy

In *Misco*, this Court granted certiorari on the question whether a court may refuse to enforce an arbitration award on public policy grounds "only when the award itself violates a statute, regulation, or other manifestation of positive law, or compels conduct by the employer that would violate such a law." 484 U.S. at 45 n.12; *see id.* at 46 (Blackmun, J., concurring). The same question—which the *Misco* Court did not reach and on which the circuits remain in conflict—is presented again here.

This Court in *Misco* observed that "the Courts of Appeals are divided on the question of when courts may set aside arbitration awards as contravening public policy." *Id.* at 35. The Court noted that the Ninth and D.C. Circuits have taken a "narrower view" of a court's power and that the First and Seventh Circuits have taken a "broader view." *Id.* at 35 n.7.[8]

In *American Postal Workers Union*, the D.C. Circuit held that a court may refuse to enforce an arbitration award on public policy grounds only "if the award itself violates established law or seeks to compel some unlawful action." 789 F.2d at 8. Thus, the D.C. Circuit concluded

---

[8] Citing *Belves Co.* v. *Teamsters Local 986*, 791 F.2d 1391 (9th Cir. 1986), *cert. denied*, 485 U.S. 985 (1987); *Northwest Airlines* v. *Air Line Pilots*, 808 F.2d 76 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1014 (1988); *American Postal Workers Union* v. *United States Postal Serv.*, 789 F.2d 1 (D.C. Cir. 1986), *cert. dismissed*, 485 U.S. 680 (1988); *United States Postal Serv.* v. *American Postal Workers Union*, 736 F.2d 822 (1st Cir. 1984); *E. I. DuPont de Nemours & Co.* v. *Grasselli Employees Indep. Ass'n of East Chicago, Inc.*, 790 F.2d 611 (7th Cir.), *cert. denied*, 479 U.S. 853 (1986).

that the district court had erred in refusing to enforce an arbitrator's decision to reinstate a discharged postal worker because "[t]he arbitrator's award was not itself unlawful, for there is no legal proscription against the reinstatement of a person such as the grievant." *Id. Accord Northwest Airlines*, 808 F.2d at 83.

Similarly, in *Belves*, the Ninth Circuit held that reinstatement of employees terminated because they were undocumented aliens did not violate public policy. The court explained that "[n]either the company nor its employees are subject to any criminal or civil liability under federal law arising from their employment relationship." 791 F.2d at 1392-93.

In contrast, the First Circuit in *United States Postal Service* held that an award reinstating an employee convicted of embezzling postal funds was properly overturned on public policy grounds. The court rejected "[t]he heart of the Union's argument * * * that although there may be a public policy against embezzling Postal Service funds, there is no public policy against the Postal Service employing convicted embezzlers. You have to have something more—a direct legal prohibition." 736 F.2d at 824.

The Seventh Circuit in *DuPont* also rejected the view (advanced in a separate opinion by Judge Easterbrook) "that an arbitration award cannot be overturned on public policy grounds unless the contract as construed by the arbitrator violates some rule of positive law." 790 F.2d at 616. The majority observed that "the courts have never construed the public policy exception so narrowly." *Id.* Relying on the First Circuit's decision *United States Postal Service*, the *DuPont* court said that "[i]f the Postal Service employs a convicted embezzler, this employment does not violate any rule of positive law, yet the First Circuit overturned an award which ordered reinstatement of such an employee, because the award violated public policy." *Id.*

B. The Conflict In The Circuits Over The Question Left Open In *Misco* Has Grown Worse

The conflict recognized by this Court in *Misco* has not been resolved but in fact has deepened. At least six circuits—the First, Third, Fifth, Seventh, Eighth, and Eleventh—have rendered decisions that squarely conflict with decisions of three other circuits—the Fourth, Ninth, and District of Columbia.

Two weeks after *Misco* was decided, the Eighth Circuit in *Iowa Electric Light and Power* v. *Local Union 204, supra*, agreed with the First and Seventh Circuits and rejected the view that an arbitration award must violate positive law to permit application of the public policy exception. The court observed that "[t]his Court is not required to find that the award itself is illegal before we overrule the arbitrator on public policy grounds." 834 F.2d at 1427 n.3. Noting that *Misco* "declined to reach the issue," the Eighth Circuit held that "[a]n arbitrator may be overruled 'when the award, although not requiring illegal conduct, is said to be inconsistent with some significant public policy.' " *Id.* (quoting Robert A. Gorman, *Labor Law: Unionization and Collective Bargaining* 597 (1982); citing *DuPont* and *United States Postal Service* with a "but see" cite to *American Postal Workers Union*).

The Third Circuit entered the fray with its *Exxon* trilogy. In *Exxon I*, the Third Circuit noted that while "[a]t least one Court of Appeals"—the D.C. Circuit—has held that an arbitrator's award "only violates public policy where it contravenes a rule of positive law which forbids reinstatement of the employee," 993 F.2d at 363, "[o]ther courts have taken a broader approach." *Id.* The Third Circuit cited as supporting the "broader approach" the Seventh Circuit's decision in *DuPont*, the Eighth Circuit's decision in *Iowa Electric*, the First Circuit's decision in *United States Postal Service*, and a Sixth Circuit case. The *Exxon I* court held that "[t]he broader test adopted by the

First, Sixth, Seventh, and Eighth Circuits appears to be the sounder approach to the question whether an arbitration award violates public policy." *Id.*[9]

In *Exxon II*, the Third Circuit noted that "[w]hile *Misco* left open the question whether an arbitration award may be set aside on public policy grounds only when enforcement of the award would violate positive law, two recent decisions of our court have explicitly or implicitly rejected that argument." 11 F.3d at 1192 (citing *Exxon I* and *Stroehmann Bakeries*).[10] The *Exxon II* court noted that "the District of Columbia Circuit ha[s] accepted this argument but * * * the First, Sixth, Seventh, and Eighth Circuits" have rejected it, and that *Exxon I* had "expressly rejected this argument" and "upheld a district court order vacating an arbitration award that did not require conduct that violated any statute, regulation, or other manifestation of positive law." *Id.*[11]

In *Gulf Coast Industrial Workers Union* v. *Exxon, supra*, the Fifth Circuit sided with the circuits holding that an arbitrator's award need not violate positive law

---

[9] Unlike the Third Circuit, we believe the Sixth Circuit's position on the violation-of-positive-law requirement is unclear.

[10] In *Stroehmann Bakeries*, the Third Circuit held that an arbitrator's award that "fully reinstates an employee accused of sexual harassment without a determination that the harassment did not occur violates public policy." 969 F.2d at 1442. And as the Third Circuit pointed out in *Exxon II*, "[w]e reached this conclusion without identifying any statute, regulation or court decision that made the reinstatement of the deliveryman—as opposed to the alleged harassment—illegal. Thus, our decision in *Stroehmann Bakeries* implicitly rejected the argument that an arbitration award may be vacated on public policy grounds only when the award requires conduct that is prohibited by positive law." 11 F.3d at 1192.

[11] *See also Exxon III*, 73 F.3d at 1293 ("In both *Exxon I* and *Exxon II* we acknowledged that [the D.C. Circuit] court of appeals had held than an arbitration award could be overturned only when its enforcement would cause a violation of positive law, whereas others have opted for a broader approach") (citations omitted).

to violate public policy. The view that "unless the award itself constitutes a clear violation of positive law, courts are powerless to intervene," said the Fifth Circuit, is "a question left purposefully unresolved by the Supreme Court in *Misco*, 484 U.S. at 45, n.12, and *expressly rejected by this Court*." 991 F.2d at 253 (emphasis added). The court said that "[l]egal authority generally holds that a court need not find that the award itself is illegal before overruling an arbitrator on public policy grounds." *Id.* at 250 n.7 (citing Gorman, *Labor Law, supra; DuPont*, 790 F.2d at 616; *Iowa Elec.*, 834 F.2d at 1427-28 n.3; *United States Postal Serv.*, 736 F.2d at 824). And it concluded that "refusing to vacate an arbitration award unless it violates some manifestation of positive law would be difficult to square with 'the more general doctrine . . . that a court may refuse to enforce contracts that violate law *or* public policy.'" *Id.* (quoting *W.R. Grace*, 461 U.S. at 766) (ellipses and emphasis supplied by the Fifth Circuit).

In *Delta Airlines* v. *Air Line Pilots, supra*, the Eleventh Circuit held that it was against public policy to reinstate an airline pilot who flew while intoxicated. Although the court identified numerous statutes and regulations prohibiting that conduct, it cited no positive law forbidding reinstatement of a pilot who flies drunk. Instead, the court held that an arbitrator's order requiring that "the employer suffer that malperformance and not discharge the offender does itself violate the same well established public policy." 861 F.2d at 674.[12]

---

12 State appellate courts, which look to federal case law for guidance in applying the public policy exception, have also weighed in on this issue in recent years. *See AFSCME* v. *Department of Cent. Management Servs.*, 671 N.E.2d 668, 679, 680 (Ill. 1996) ("We believe that a bright-line test requiring that the award itself violate an *explicit* law has the potential to swallow the public policy exception. * * * [W]e decline AFSCME's invitation to adopt such

In conflict with the decisions of the First, Third, Fifth, Seventh, Eighth, and Eleventh Circuits (as well as the state courts cited in footnote 12), the Ninth Circuit has held that an arbitration award must violate positive law for it to be invalid on public policy grounds. In *Foster Poultry Farms, supra,* two commercial vehicle operators had been discharged pursuant to a drug testing program, and an arbitrator ordered reinstatement. On appeal, the Ninth Circuit rejected the argument that the reinstatements violated public policy. The court held that "[b]ecause the DOT regulations do not make it illegal to reinstate employees who test positive for drug use, it *cannot* be said that the DOT regulations 'specifically militate[] against the relief ordered by the arbitrator' in this case." 74 F.3d at 174 (quoting *Stead Motors of Walnut Creek* v. *Automotive Machinists Lodge No. 1173,* 886 F.2d 1200, 1212-13 (9th Cir. 1989) (en banc), *cert. denied,* 495 U.S. 946 (1990)) (emphasis in original).[13] The Ninth Circuit further explained that:

> The DOT regulations * * * do not express an explicit, well-defined and dominant public policy permanently enjoining the employment of commercial

---

a rigid rule") (emphasis in original); *Cleveland Bd. of Educ.* v. *International Bhd. of Firemen & Oilers Local 701,* 696 N.E.2d at 664 (rejecting the view that a "reinstatement award has to violate a rule of positive law before it violates public policy" and following *Exxon I*).

[13] In *Stead Motors,* a plurality of the en banc Ninth Circuit held that "[i]f a court relies on public policy to vacate an arbitral award reinstating an employee, it must be a policy that bars *reinstatement*" and that a court "must demonstrate that the policy is one that specifically militates against the relief ordered by the arbitrator." 886 F.2d at 1212-13 (opinion of Reinhardt, J.) (emphasis in original). As Judge Trott noted in dissent, the plurality opinion "suggest[ed] that only a precise violation of a positive law caused by the award itself would suffice to meet the Supreme Court's test—a question left undecided in *Misco.*" *Id.* at 1222 (Trott, J., dissenting).

> motor vehicle drivers who test positive for drug use. The DOT regulations only prohibit employees who test positive for drug use from operating commercial motor vehicles; the DOT regulations do not require that such employees be automatically discharged. [*Id.* (internal quotation marks omitted).]

With the decision below and *Westvaco*, the Fourth Circuit has now joined the Ninth and D.C. Circuits in opposition to the First, Third, Fifth, Seventh, Eighth, and Eleventh Circuits. In *Westvaco*, an arbitrator reinstated an employee terminated for sexual harassment. In upholding that decision, the Fourth Circuit explained that "while it is certainly true that there is a public policy against sexual harassment, the district court formulated it in too general a fashion. There is no public policy that every harasser should be fired." 171 F.3d at 977. Nowhere in the case law and regulations concerning Title VII of the Civil Rights Act, said the *Westvaco* court, "is there the suggestion that every employee who makes a mistake must automatically lose his or her job." *Id. But see Stroehmann Bakeries, supra* (discussed in note 10, *supra*).

In keeping with *Westvaco*, the decision in this case turned on the fact that "the DOT Regulations do not require that employees who test positive for drug use be automatically discharged." App. 20a-21a. *See also* App. 21a ("Because the DOT Regulations do not make it illegal to reinstate employees who test positive for drug use, it cannot be said that the DOT Regulations 'specifically militate against the relief ordered by the arbitrator' in this case.") (quoting *Foster Poultry Farms*, 74 F.3d at 174). In other words—in the language of the question presented in *Misco*—the courts below held here that since Smith's reinstatement was not contrary positive law, it was not against public policy.

In *Local 97, IBEW* v. *Niagara Mohawk Power Corp.*, —— F.3d ——, 1999 WL 975711 (2d Cir. Oct. 28,

1999), *petition for cert. filed*, 68 U.S.L.W. 3355 (U.S. Nov. 16, 1999) (No. 99-845), the Second Circuit seemingly sided with the minority view that only a violation of positive law can trigger the public policy exception. There, a nuclear power plant argued that reinstatement of a security officer who failed to respond to an alarm and then lied to investigators about the incident would violate a Nuclear Regulatory Commission ("NRC") regulation requiring that nuclear power workers be "trustworthy and reliable." The court concluded, however, that this regulation "by itself is too general a standard to justify the reversal of an arbitrator's reinstatement award based on public policy grounds." 1999 WL 975711 at *9. But the court added that a public policy against reinstatement "perhaps" would be proved "if the Company could demonstrate that the NRC itself—if confronted with the Arbitrator's findings concerning [the employee]'s conduct—would unequivocally deem [his] conduct so severe as to render him ineligible for future employment." *Id.* at *10. This suggests that the Second Circuit would deem a given reinstatement against public policy if that were the NRC's view even absent a regulation specifically forbidding reinstatement. Thus, the Second Circuit's law is somewhat uncertain.[14]

Accordingly, "considerable uncertainty remains in the federal circuit courts regarding the proper scope of the public policy exception" since "several federal circuits hold that the award must actually compel a violation of positive law to meet the public policy exception" while others hold "contrary views." Bret F. Randall, *The History, Application, and Policy of the Judicially Created Stand-*

---

[14] In 1998, in *IBEW* v. *Niagara Mohawk*, *supra*, the Second Circuit noted the conflict on the question left open in *Misco*, *see* 143 F.3d at 722, but concluded that it "need not adopt" the "more restrictive view" to find the public policy exception inapplicable. *Id.*

ards of Review for Arbitration Awards, 1992 BYU L. Rev. 759, 777. As another commentator has said, "[i]f the Court intended *Misco* to put to rest the controversy and confusion over application of the public policy exception, it has not been demonstrably successful. Lower courts continue to split over the breadth of the exception's application." Jeffrey Sarles, *The Case of the Missing Woman: Sexual Harassment and Judicial Review of Arbitration Awards*, 17 Harv. Women's L.J. 17, 24 (1994) (footnote omitted).

The issue left for another day in *Misco* is raised again here. Time has only fueled the conflicts that prompted the grant of certiorari in that case. When the Court granted certiorari in *Misco*, the circuit conflict was 2-2. It is now 6-3. This Court should take this opportunity to answer the question left open in *Misco*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

RONALD E. MEISBURG
HEENEN, ALTHEN & ROLES
1110 Vermont Ave., N.W.
Suite 400
Washington, D.C. 20005
(202) 887-0800

JOHN G. ROBERTS, JR.*
DAVID G. LEITCH
H. CHRISTOPHER BARTOLOMUCCI
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

ANNA M. DAILEY
DONNA C. KELLY
HEENAN, ALTHEN & ROLES
1380 One Valley Square
P.O. Box 2549
Charleston, West Virginia 25329
(304) 342-8960

* Counsel of Record

Counsel for Petitioner